No. 95-1621

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HARBOR TUG AND BARGE COMPANY,
Petitioner,

v.

JOHN PAPAI and JOANNA PAPAI,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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I. THE FORMAL AWARD OF LHWCA COMPENSATION BENEFITS SHOULD PRECLUDE FURTHER CLAIM TO SEAMAN REMEDIES.

It is common ground in all the briefs [1] that seaman remedies and LHWCA remedies are mutually exclusive, but that until a claimant's status is determined, the claimant may pursue both remedies. What is at issue is whether a claimant who has received a formal award of LHWCA compensation is precluded from further pursuing seaman remedies.

A. To Uphold Section 905(a) And The Intent Of The LHWCA, A Formal Award Of LHWCA Benefits Should Per Se Preclude Further Seaman Remedies.

A compensation order awarding LHWCA benefits should per se preclude further seaman remedies. The alpha and omega of this issue [2] is 33 U.S.C. § 905(a), which states:

> The liability of an employer prescribed in § 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty on account of such injury . . .

HTB's "liability" under the LHWCA was established by the ALJ's compensation order.[3] Thus § 905(a) precludes

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[1] For convenience, Harbor Tug and Barge Company ("HTB") refers to all arguments in support of Respondent as those of "Papai".

[2] "Neither [the LHWCA claimant] nor the Ninth Circuit has attempted to base their position on the language of the statute, where analysis in a statutory construction case ought to begin, for 'when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished.'" *Metropolitan Stevedore Co. v. Rambo*, —— U.S. ——, 115 S.Ct. 2144, 2147, 132 L.Ed.2d 226, 231-232 (1995), citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992).

[3] Compensation orders establishing "liability" under the LHWCA can be issued in two other ways. One is by way of an order by the District Director following agreement on controverted issues. 20 CFR § 702.315. The other is by way of 33 U.S.C. § 908(i). A § 8(i) "settlement" is not like a civil settlement. It is akin to a

HTB's further employer liability under the Jones Act or general maritime law. The preclusive effect of § 905(a) results from the statute itself and does not depend upon the application of the doctrine of collateral estoppel.

1. *The Insurance Requirement Of § 905(a) Does Not Affect The Exclusivity Of The Employer's Liability.*

Section 905(a) states one exception to the exclusivity of the employer's liability: when the employer fails to obtain LHWCA insurance or qualified self-insurance.[4] Papai argues that this proves that the exclusivity of the employer's liability under § 905(a) is not "absolute", and that therefore the Court should infer or create additional exceptions. A more reasonable conclusion is that where Congress intended an exception to the exclusivity of the employer's liability, Congress stated that exception expressly. The LHWCA does not contain any express exception to the exclusivity of the employer's liability under §905(a) when the claimant also files a Jones Act claim.

2. *Section 905(b) Does Not Gainsay The Exclusivity Of The Employer's Liability Under § 905(a).*

Section 905(b) allows an injured LHWCA worker to sue the "vessel" as a "third party" for negligence. 33 U.S.C. § 905(b). The vessel includes its owner and operator.[5] 33 U.S.C. § 902(21). Thus, for example, an injured longshoreman who slips on oil on the ship's deck caused by the shipowner's negligence (including that of its crewmember employees) can recover from the vessel in rem or from the shipowner.

Sometimes the same company both employs an injured LHWCA worker and is the shipowner. If § 905(a) and

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stipulated judgment. See 20 CFR § 702.241-243. It results in a compensation order requiring the employer to pay LHWCA benefits. Penalties are imposed for failure to pay those benefits. 33 U.S.C. § 914(f); *Reid v. Universal Maritime Service Corp.*, 41 F.3d 200, 201 (4th Cir. 1994).

[4] No such claim has been made in this case.

[5] For convenience, HTB refers to both as "shipowner".

§ 905(b) were read to be contradictory, one LHWCA worker would be denied the right to sue the vessel and shipowner for negligence, whereas a fellow LHWCA worker injured under the same circumstances would be allowed to sue, simply because the former's employer also is the shipowner, but the latter's is not. To avoid this anomaly, the courts have developed the "dual capacity" doctrine. That doctrine allows an LHWCA worker to sue the shipowner for negligence under § 905(b) even if the shipowner also is his employer, but only for negligence in its shipowner (not employer) capacity.[6]

Papai argues that § 905(b) also should be read to allow a claimant to sue the dual shipowner/employer under the Jones Act and general maritime law. That interpretation is unprecedented and would eviscerate the exclusivity of the employer's liability under § 905(a). A seaman's remedies for negligence under the Jones Act and for unseaworthiness under the general maritime law are *solely against his employer.*[7] Section 905(b) has not been interpreted to allow the shipowner/employer to be held liable as an employer. Thus § 905(b), as interpreted by the dual capacity doctrine, preserves the employer's exclusivity of liability under § 905(a) insofar as seaman remedies are concerned.[8]

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[6] Thus, for example, assume that HTB as a dual shipowner/employer hires a shoreside maintenance painting gang (LHWCA workers, not seamen) to paint its vessel, and also has an operational crew aboard. Assume that one member of the maintenance painting gang is injured when he is negligently bumped off a ladder while painting. If another member of the painting gang bumps the ladder, that negligence would be in HTB's employer capacity. If a ship's crewmember bumps the ladder, that negligence would be in HTB's shipowner capacity. In the case at bar, the District Court found no negligence by HTB in its shipowner capacity.

[7] *Cosmopolitan Shipping v. McAllister*, 337 U.S. 783, 69 S.Ct. 1317, 93 L.Ed. 1692 (1949); *Allen v. United States*, 338 F.2d 160, 162 (9th Cir. 1964).

[8] The main differences between a negligence cause of action under § 905(b) and seaman remedies are that the latter includes a cause of action for unseaworthiness, and the causation require-

The seminal Supreme Court case on the dual capacity doctrine was *Reed v. S.S. YAKA*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963). In that case Reed, a longshoreman, sued the ship's operator, who also was his stevedore employer, when Reed fell because a defective pallet on the ship broke. The Court allowed Reed to sue the defendant under § 905(b) in its capacity as shipowner, not as a seaman's employer under the Jones Act.[9]

The latest Supreme Court case to directly address the dual capacity doctrine was *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983). Pfeifer, a longshoreman, was injured while loading a vessel when he fell on snow and ice that was negligently left on the gunnels. His stevedore employer also operated the vessel on which he was injured. Having received his LHWCA benefits, Pfeifer brought an action under § 905(b) against the defendant in its capacity as shipowner (not as an employer under the Jones Act). The Court allowed the action, noting: "Of course, § 5(b) does make it clear that a vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' capacity." 462 U.S. at 530, n.6.[10]

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ment in a Jones Act negligence cause of action is slight. *See* 1 Schoenbaum, *Admiralty and Maritime Law* (2d ed. 1994), § 6-22, pp. 319-324, and § 6-25, pp. 333-380.

[9] In 1963, when *Yaka* was decided, a longshoreman could sue the vessel for unseaworthiness under § 905(b). The 1972 amendments to the LHWCA eliminated unseaworthiness as a ground of liability under § 905(b).

[10] *See also Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 87 n.3, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991). Lower courts uniformly have held that under § 905(b) an LHWCA worker can sue a dual shipowner/employer defendant as a third party for negligence, but not for Jones Act employer liability. *See Levene v. Pintail Enterprises, Inc.*, 943 F.2d 528, 531 (5th Cir. 1991); *Guilles v. Sea-Land Serv.*, 12 F.3d 381 (2d Cir. 1993); *Roach v. M/V AQUA GRACE*, 857 F.2d 1575 (11th Cir. 1988). *See generally* Frazor T. Edmondson, *Toward A Vessel Owner's Interpretation Of Dual Capacity*, 18 Del. J. Corp. L. 477 (1993).

3. *Section 903(e) Does Not Evidence Congressional Intent To Invalidate The Exclusive Liability Provision Of § 905(a) Or Preclude The Application Of Collateral Estoppel.*

33 U.S.C. § 903(e) states:

> Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 688 of Title 46 (relating to recovery for injury to or death of seamen) shall be credited against any liability imposed by this chapter.

Papai contends that § 903(e) both vitiates the exclusive liability provision of § 905(a) and evidences Congressional intent precluding the application of collateral estoppel to an ALJ finding on the claimant's status. Section 903(e) should not, however, be so interpreted.

a. Section 903(e) was passed in 1984 in the wake of *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980). In that case employees of Sun Ship, which was a shipbuilder and repairer, were injured and filed for state worker's compensation. Their injuries also arguably fell within the ambit of the LHWCA. Sun Ship argued that the LHWCA was exclusive and preempted state worker's compensation laws. The Supreme Court disagreed, based upon the historical interplay between state worker's compensation acts and the LHWCA. The Supreme Court on several previous occasions had held that "maritime but local" injuries were subject to the concurrent jurisdiction of both state worker's compensation laws and the LHWCA, and either remedy scheme could apply to a given injury, at the claimant's choice. (447 U.S. at 717-719.) The Court stated that the 1972 Amendments to the LHWCA, which extended the LHWCA's coverage landward, supplemented rather than supplanted state worker's compensation laws. (447 U.S. at 719-720.) Thus the Court in *Sun Ship* allowed the employees to collect benefits under the state worker's compensation law.

The *Sun Ship* case differs from Papai's case. Whereas the Supreme Court has determined that state worker's

compensation laws and the LHWCA are concurrent remedy schemes, the Court has repeatedly found that the LHWCA and the Jones Act are mutually exclusive remedy schemes. The Court in *Sun Ship* stated, as it had done in *Calbeck v. Travelers Ins. Co.*,[11] that because state compensation laws and the LHWCA are concurrent, § 905(a) was "not involved." (447 U.S. at 723, n.4.) Section 905(a) is involved in Papai's case. In *Sun Ship* the issue was not whether the claimants could pursue two remedies (state and LHWCA compensation) to conclusion and then pick the higher one, but whether the claimants could recover state worker's compensation as a remedy at all. While the Court in *Sun Ship* noted that the claimants' potential entitlement to LHWCA benefits may not be precluded because state worker's compensation awards generally are not treated as final or conclusive, the Court reserved decision on the issue. (447 U.S. at 724, n.6.) In Papai's case, the issue of preclusion of a second remedy is presented.

b. Section 903(e) was added to the LHWCA in 1984 as part of a package of amendments.[12] Given the line of cases through *Sun Ship*, the main purpose of § 903(e) is to prevent a double recovery when state worker's compensation laws and the LHWCA are concurrent.[13] The legislative history of § 903(e) gives no guidance as to why Jones Act payments are included.

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[11] 370 U.S. 114, 132 n.16, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962).

[12] Longshore and Harbor Workers Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639 (codified at 33 U.S.C. § 901 *et seq.*).

[13] ". . . [D]ouble recovery was a possibility before the enactment of section 903(e). When it enacted section 903(e) in 1984, Congress intended to overrule *United Brands Co. v. Melson*, 594 F.2d 1068 (5th Cir. 1979). *See* 130 Cong. Rec. 8326 (1984) (explanation of House amendment to S. 38); 130 Cong. Rec. 25905 (remarks of Rep. Erlenborn). In *Melson*, the court held that an employee may recover compensation under both the LHWCA and the state [compensation] act, and there was no requirement in the LHWCA that the employee's federal award be reduced by the amount of the state settlement. *Melson*, 594 F.2d at 1074-75. Thus, the legislative history shows that Congress intended to prevent double recovery by broadening an employer's right to receive an offset." *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1350 (9th Cir. 1993). *See also* the legislative history of § 903(e) in the House Report, which states only: "This section also provides that any compensation received by a worker for the same injury under another workers' compensation law shall be credited against compensation received under this Act." H.R. Rep. No. 98-570, 98th Cong., 1st Sess., pt. 1, at 26 (1983).

Section 903(e) also must be viewed with the asymmetry of the LHWCA and the Jones Act in mind. The preclusive effect of the employer's liability under the LHWCA is stated in § 905(a). The Jones Act, conversely, has no language equivalent to § 905(a). Therefore while an LHWCA compensation order may preclude a subsequent Jones Act claim on two grounds—§ 905(a) and collateral estoppel—a Jones Act award may preclude a subsequent LHWCA claim only on the ground of collateral estoppel. Thus § 903(e) may have been drafted to include payments under the Jones Act to cover the situation in which a Jones Act payment has been made but—for any of several reasons—collateral estoppel does not apply.[14]

If Congress meant to rescind § 905(a) in the 1984 Amendments to the LHWCA, it would have done so directly. No legislative history and no case law precedent supports the proposition that § 903(e) was intended to retract the exclusivity of the employer's liability under § 905(a).

4. *Enforcing § 905(a) Or Applying Collateral Estoppel Does Not Create An Inequitable Election Of Remedies.*

HTB does not contest this Court's ruling in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486, 116

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[14] For instance, the Jones Act payment may be made pursuant to a settlement. This is the only context in which § 903(e) actually has been applied to an LHWCA claim following a Jones Act payment. *See Bundens v. J.E. Brenneman Co.*, 46 F.3d 292 (3d Cir. 1995). The court noted, however, that collateral estoppel would apply to bar a subsequent LHWCA claim if the claimant, instead of settling, had been adjudicated to be a seaman for purposes of his Jones Act claim. *Bundens*, 46 F.3d at 298 n.12.

L.Ed. 2d 405 (1991), that the mere receipt of LHWCA benefits without a formal compensation order does not in itself preclude seaman status. The Court stated in *Gizoni* that until a claimant's status is decided in one forum or another, he should not be forced to an "election of remedies." 502 U.S. at 92 n.5. The Court's concern was that if a claimant is forced to select one remedy scheme before his status is determined, he risks having no remedy. That is not the situation in Papai's case, or in any case in which either the court or the LHWCA forum has determined the claimant's status. Where status has been determined, the claimant has a remedy. The question in this case is whether he should have two.[15]

The phrase "election of remedies" has no clear legal meaning.[16] It is not a rule of substantive law, but one of procedure or judicial administration. Arising from principles of estoppel, it is meant in a general sense to prevent a party from asserting and recovering on two inconsistent procedures on the same set of facts. Like waiver and estoppel, the election of remedies doctrine constitutes an affirmative defense. 25 Am. Jur. 2d *Election of Remedies* §§ 1-6 (1996). The election of remedies defense, however, is separate and distinct from the doctrine of collateral estoppel.[17] HTB could have asserted three defenses against Papai's Jones Act claim following his LHWCA award: (1) § 905(a), (2) collateral estoppel, and (3) the affirmative defense of election of remedies. HTB has not asserted and does not assert the defense of election of remedies. The potential election of remedies defense is not controlling of or even relevant to HTB's defenses under § 905(a) and collateral estoppel.

[15] Since an LHWCA worker is in fact allowed two remedies—compensation benefits and a § 905(b) negligence action against the vessel—it is more accurate to say that Papai is seeking three remedies instead of two.

[16] "A confusing congeries of doctrines have been lumped together under the election of remedies label." 18 Wright, Miller & Cooper, *Federal Practice and Procedure*, § 4476, p. 772.

[17] 18 Wright, Miller & Cooper, *Federal Practice and Procedure*, § 4476, pp. 772-779.

Furthermore, the election of remedies doctrine does not allow a claimant two remedies when he is only entitled to one. Papai's argument about election of remedies ignores the fundamental distinction between the *Gizoni* case —in which the claimant was faced with the possibility of having no remedy—and this case, in which Papai has remedies. If this Court follows Papai's suggestion and refuses to give binding effect to the first status determination by a court or ALJ, that could result in an LHWCA forum determination that a claimant was a seaman (hence denying recovery) and a Jones Act forum determination that the claimant was not a seaman (hence denying recovery). Papai's election of remedies argument therefore could create the very problem that the Court in *Gizoni* tried to avoid.

Papai's argument on this point also ignores the practical consequences of allowing a second remedy: excessive and duplicative litigation. Allowing a second remedy obviously creates a powerful incentive for claimants to litigate the case twice. The burden on the courts and administrative tribunals would be significant and unavoidable.

5. *Enforcing The Statutory Scheme Is Fair.*

a. In the guise of arguing that he is being forced into an election of remedies, Papai actually is contending that he should be allowed two remedies instead of one. Papai asserts that this would be beneficial since he would not be deprived of the highest recovery that might be available to him. But this is a policy decision properly left to Congress, which enacted the Jones Act and the LHWCA as mutually exclusive, and which enacted § 905(a).[18] If maritime workers wish to be entitled to concurrent remedies—the right to pursue both LHWCA remedies and seaman remedies to conclusion, and to pick the higher re-

[18] The Supreme Court has recognized that the LHWCA "was not a simple remedial statute intended for the benefit of the workers," but was designed to strike a balance between the concerns of LHWCA workers and their employers. *Morrison-Knudsen Const. Co. v. Dir., Office of Wkrs. Comp. Prog.*, 461 U.S. 624, 635-6, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983).

covery—that desire should be addressed to Congress, not to this Court.

b. A claimant generally is able to ensure that his status will be determined in the forum of his choosing, for he controls the order of proceedings. If a claimant wishes his status to be determined by the court, he can sue under the Jones Act and defer his LHWCA claim. The LHWCA claim will not be time barred because the Act provides an extension of time to make a claim until the Jones Act suit is concluded. 33 U.S.C. § 913(d).

If a claimant wishes his status to be determined by the Department of Labor or an ALJ, he can pursue his LHWCA claim and defer his Jones Act suit for up to three years (the Jones Act time bar). 45 U.S.C. § 56. Three years is normally sufficient time for the LHWCA forum to determine his status, and if it takes longer, he can file his Jones Act suit and seek a stay pending determination of his LHWCA claim.

Papai argues that a claimant whose status is ambiguous (who may be either a Jones Act seaman or an LHWCA worker) may be forced to accept LHWCA benefits because of economic necessity, thereby foregoing his potential seaman remedies.[19] How often this really happens, the record does not show. This did not happen in Papai's case, since he received LHWCA compensation without an award for years, and simultaneously sought seaman remedies.[20]

[19] Papai's argument is premised upon the unsupported assumption that Jones Act awards generally are greater than LHWCA compensation benefits. Nothing in the record supports this, and the authorities Papai cites for the proposition make conjectural statements without any statistical support. While the potential remedy under the Jones Act may be larger because a seaman can recover for pain and suffering, that remedy is far less certain because (unlike under the LHWCA) a seaman must prove the employer's fault, and his recovery is reduced in proportion to his own negligence. Whether one remedy is more advantageous to a claimant than another will vary from case to case.

[20] Papai's brief states that he filed a claim for LHWCA benefits only after the District Court's ruling denying him seaman status. That is misleading. Papai was injured on March 13, 1989. Pursuant to 33 U.S.C. § 914, on March 30, 1989, HTB filed Form LS-206 with the Department of Labor, entitled "Payment of [LHWCA] Compensation Without Award," and began paying Papai LHWCA benefits. HTB made payments every two weeks thereafter until the ALJ hearing on June 2, 1992. Pet. App. 34a. Papai accepted all of these payments, both before and after he filed his Jones Act Complaint in January 1990, and before and after the District Court's initial ruling on his status on May 29, 1990. The payments were premised upon Papai's initial report of a left knee injury. On April 15, 1991, Papai filed a Form LS-203 with the Department of Labor, claiming that he had not only a knee injury, but also a back injury, which would yield a higher LHWCA award. On May 30, 1991, HTB filed Form LS-207, controverting this newly claimed back injury. This (not the status issue) is what triggered the necessity for an ALJ hearing.

Moreover, a claimant who is receiving LHWCA compensation can defeat or substantially delay the entry of a compensation order that would bar him from a Jones Act remedy. For instance, a compensation order under § 8(i) or by the District Director under 20 CFR § 702.315 requires the claimant's assent, which he can withhold. Similarly, a trial before an ALJ will not occur for months or years, and the claimant can withdraw his LHWCA claim before the trial begins.[21] Conversely, if for economic reasons the claimant requests a prompt decision on status, both the Department of Labor and the courts have the power and the procedural tools to make one.[22]

A claimant whose status is ambiguous and who for economic reasons decides to first seek LHWCA compensation rather than seaman remedies will not be disadvantaged. If the ALJ finds that he was an LHWCA worker and not a seaman when injured, the claimant loses nothing, since

[21] During this period the employer has an incentive to make LHWCA compensation payments even without a compensation order if the employer believes that the claimant is likely to be determined to be an LHWCA worker rather than a seaman. The payments are not truly voluntary; the employer is required to make the payments if he does not controvert the obligation to do so, failing which he is subject to penalties. 33 U.S.C. § 914(a) and (e); 20 CFR § 702.231-233.

[22] E.g., a court could sever the status issue and try it first, well before the normal trial date.

he would not be entitled to seaman remedies in the first place. If the ALJ finds that he was a seaman, then he is on his way toward the seaman remedies that he desires, and was not entitled to LHWCA compensation.[23]

Similarly, if the claimant believes that he is a seaman, and if to preserve his claim to that status he defers an LHWCA claim, that merely puts him into the same economic position as all other seamen under the Jones Act.[24]

Conversely, allowing a claimant the right to pursue to conclusion both LHWCA and Jones Act remedies would create a privileged class of workers, who will be entitled to receive LHWCA benefits and then sue under the Jones Act. Injured workers who are unambiguously seamen have no such advantage. As the Fifth Circuit Court of Appeals has stated, Congress did not intend the LHWCA to be a stepping stone on the way to a Jones Act jury award, or a safety net guaranteeing workers a minimum award as they seek greater rewards in court.[25]

c. Papai argues that allowing a preclusive effect to an ALJ decision on status would penalize employers who voluntarily pay LHWCA compensation while immunizing from seaman claims those who force an LHWCA adjudication. Giving preclusive effect to compensation orders under § 8(i) and 20 C.F.R. § 702.315 solves this prob-

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[23] If a claimant receives LHWCA compensation benefits without a compensation order, and then is found to be a seaman but fails to recover under the Jones Act (e.g., because the employer defendant was not at fault), the employer cannot recoup the LHWCA compensation paid to the claimant, even though (because he was a seaman) the claimant was not entitled to receive it. *Stevedoring Serv. of America, Inc. v. Eggert*, 953 F.2d 552 (9th Cir. 1992).

[24] Such a person is not without provisional remedies. Under both the LHWCA and the Jones Act, the employer must pay for the claimant's medical treatment. In addition, the claimant will receive either voluntary LHWCA benefits as an LHWCA worker or maintenance and unearned wages as a seaman. A seaman's maintenance rate is governed by union contract; Papai's maintenance rate was $22 per day. (J.A. 73.)

[25] *Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1132-3 (5th Cir. 1991); *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423, 425-7 (5th Cir. 1992).

lem when such orders are available, since in that case an employer can make LHWCA payments and still be protected against a Jones Act claim without forcing an unnecessary ALJ adjudication.[26]

Papai's argument in effect is that because some employers who make voluntary compensation payments would be subject to a subsequent Jones Act claim, *all* employers should be disadvantaged by making them all subject to a second Jones Act remedy. Employers certainly would prefer some protection against a second remedy, even if that protection would not always be available to them.

d. Papai argues that no harm arises in allowing a claimant two remedies because the employer is entitled to a credit, which prevents a double recovery by the claimant. Of course, this is not itself a reason for allowing two remedies. In any event, the credits do not cover all the damages that the employer may have to pay, do not cover attorney fees, and can allow a claimant to recover more in total than either remedy scheme separately allows.[27]

B. ALJ Awards Under The LHWCA Satisfy The Requirements Of Administrative Collateral Estoppel.

Even if the Court holds that § 905(a) does not per se preclude Papai's further claim to seaman remedies, then Papai should be precluded from those remedies on the basis of collateral estoppel.

1. *No Statutory Intent Precludes The Application Of Administrative Collateral Estoppel In This Case.*

Papai argues that it would be inappropriate to infer a Congressional intent that collateral estoppel applies to seaman status decisions. This argument unjustifiably reverses the legal presumption. The Court does not need to

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[26] Upon that basis, the Supreme Court rejected an argument similar to Papai's in *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529, 538, 103 S.Ct. 1991, 76 L.Ed.2d 120 (1983).

[27] See HTB's opening brief, pp. 28-30.

infer Congressional intent that collateral estoppel applies; that application is presumed.[28]

2. *LHWCA § 22 Does Not Preclude The Application Of Collateral Estoppel.*

LHWCA § 22 allows the district director[29] of the Department of Labor, on the ground of a "change in conditions" or because of a "mistake in the determination of fact" by him, to review a compensation case and issue a new compensation order within one year after an LHWCA claim has been rejected or the last payment of compensation has been made. (33 U.S.C. § 922.) The Solicitor General argues that therefore no ALJ order is "final" until the one year period has passed, so collateral estoppel does not apply. The point is not in issue in this case because: (a) the one year period has long since passed, and (b) § 22 applies only to determinations of fact by the district director, not to determinations by an ALJ. *Director, OWCP v. Jourdan*, 975 F.2d 1286 (7th Cir. 1992). Also, § 22 is irrelevant because collateral estoppel applies to a final decision of a lower court or administrative tribunal even though that decision could later be reversed on appeal,[30] or could later be modified or reversed upon the discovery of new information.[31]

3. *An Injured Claimant Has An Incentive To Successfully Litigate His Status Before An ALJ.*

Collateral estoppel does not apply to preclude a party from relitigating an issue if the party's incentive to vigorously litigate that position in the prior proceeding was

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[28] *Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991).

[29] Formerly called the deputy commissioner.

[30] Both the Papai and UBCJ briefs note that pendency of an appeal does not suspend the operation of an otherwise final judgment as res judicata or collateral estoppel. Citing 1B James Wm. Moore, et al., *Moore's Federal Practice*, para. 0.416[3] (2d ed. 1985) pp. 521-522, and *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497 (D.C. Cir. 1983).

[31] See Fed. R. Civ. Proc. 60(b).

inadequate. Therefore, Papai argues, the employer should not be allowed to invoke collateral estoppel in a Jones Act suit if an ALJ has found the claimant to be an LHWCA worker.[32] It is the claimant, however, not the employer, who would seek to relitigate the status issue. The employer could invoke collateral estoppel in a Jones Act suit only if the claimant has won the status issue in the LHWCA forum. When a claimant seeks LHWCA compensation, he necessarily represents that he is a covered worker, i.e., not a seaman. The claimant has a strong incentive to win that issue because otherwise he cannot receive an award of LHWCA benefits.[33]

II. A CLAIMANT'S STATUS AS A SEAMAN SHOULD BE BASED UPON HIS CONNECTION TO THE VESSEL TO WHICH HE IS ASSIGNED WHEN INJURED OR, IN CERTAIN CIRCUMSTANCES, AN IDENTIFIABLE GROUP OF VESSELS BELONGING TO HIS EMPLOYER.

A. To Be Considered A Seaman, The Claimant Must Have A Connection To A Vessel That Is Substantial In Both Duration And Nature.

Under *Chandris*,[34] a prerequisite for seaman status is that the claimant have a connection to a vessel that is

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[32] Papai cites *Simms v. Valley Line Co.*, 709 F.2d 409 (5th Cir. 1983) for the proposition that a determination of LHWCA worker status does not bar a subsequent Jones Act claim. The *Simms* holding is inapplicable. The case was decided entirely upon the procedural issue that Simms had no standing to appeal. The court did not address § 905(a). The *Simms* court discussed in dicta and in footnotes whether collateral estoppel might apply to a seaman status claim in a Jones Act case following the grant of LHWCA benefits, but did not decide the issue. (709 F.2d at 412-413.)

[33] The Solicitor General was well aware of these litigation incentives when it took the position in *Gizoni* that collateral estoppel should apply to bar a subsequent Jones Act suit, contrary to its position in this case. See United States Supreme Court Official Transcript at 41-43, *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991) (No. 90-584).

[34] *Chandris, Inc. v. Latsis*, —— U.S. ——, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995).

substantial in both duration and nature. *Chandris* requires that determination of a claimant's seaman status should be based upon his job assignment when the injury occurs.[35]

Prevailing authority has been that the Fleet Seaman Doctrine applies under certain circumstances to allow consideration of the claimant's relationship to several or all of the employer's vessels. While *Chandris* did not directly address the Fleet Seaman Doctrine, *Chandris* favorably cited the Fifth Circuit statement of the Doctrine and adopted the language of its standard formulation.[36]

The Court of Appeals below greatly expanded the seaman status test by allowing consideration not only of the claimant's job assignment when injured, but also his past (and future) job assignments. The Court of Appeals decision was based upon a patent misreading of the *Chandris* decision.[37] Expanding the seaman status test in this way would make seaman status unpredictable and discretionary. It would undoubtedly generate significantly more litigation because a claimant who—based upon his job assignment when injured—is clearly a seaman or clearly an LHWCA worker would be able to seek a jury determination that prior or subsequent job assignments should control the status issue in his case.

The briefs for Papai barely address any of these points. They do not explain why a significant expansion of the right to seaman status is necessary, logical, or desirable, how such an expansion comports with *Chandris*, or how that expansion would avoid unpredictable status determinations and excessive litigation. On this subject, what those briefs do not say is more significant that what they do say.

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[35] 115 S.Ct. at 2191, 132 L.Ed.2d at 339-40.

[36] 115 S.Ct. at 2189-90, 132 L.Ed.2d at 336-7.

[37] See HTB's opening brief, pp. 37-38.

1. *For The Claimant To Be A Seaman, His Relationship To The Vessel Must Subject Him To Perils Of The Sea.*

Papai cites *Fisher v. Nichols*, 81 F.3d 319 (2d Cir. 1996), for the proposition that the Fleet Seaman Doctrine is too narrow. Fisher was injured during a sailing race while serving as a crewmember aboard an oceangoing sailboat for one day. He sued his employer (Nichols) under the Jones Act. The jury found him to be a seaman and granted him an award. On appeal, Nichols argued that Fisher was not a seaman. The Court of Appeals acknowledged that land-based employees who are injured while aboard ship do not qualify for Jones Act coverage. The court felt that if it could consider Fisher's status with regard only to his job aboard the sailboat, he did not have a connection with the vessel that was substantial in duration, because the job was for only one day. Believing that Fisher was "the type of person to whom the Jones Act was designed to give protection," however, and thus motivated to grant him seaman status, the court affirmed the award by also considering Fisher's regular employment as a seaman for other employers before the accident, rejecting the Fleet Seaman Doctrine adopted in the Third, Fifth, and Ninth (*pre-Papai*) Circuits.

Although the *Fisher* court stated that consideration of a claimant's prior work history in other job assignments is "consistent" with *Chandris* (81 F.3d at 323), clearly it is not. At most, the *Fisher* decision reinforces the split in the Circuits that *Papai* created as to the Fleet Seaman Doctrine. In addition, if the decision in *Fisher* is correct at all, it should have been decided upon different grounds. Fisher's entire job assignment on the day of the accident was to man the boat while it was at sea. That was sea-based work and, at least arguably, substantial in duration (100% of his time in that job assignment). The entirety of Fisher's one day job exposed him to the perils of the sea. For that reason, Fisher's status could properly have been left to the jury to decide.

Papai's case is different. The entirety of Papai's job was shore-based and did not expose him to the perils of the the sea. This is an important distinction. As this Court stated in *Chandris*:

> The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea.

Chandris, Inc. v. Latsis, —— U.S. ——, 115 S.Ct. 2172, 2190, 132 L.Ed.2d 314, 337 (1995).

In one sense, but not in the sense germane to seaman status, anyone standing on a floating boat is subject to "perils of the sea." A longshoreman—classically an LHWCA worker and not a seaman—typically boards a ship each day to load and discharge cargo, and he is subject to the perils of the vessel's sinking at the dock, or its surging and rolling due to wave action, passing ships, or high winds. These are the same perils that Papai faced, but they are not the type or magnitude of perils that a seaman faces when a ship is at sea, or that justify seaman status.

> Exposure to 'perils of the sea' and to risks attending the movement of vessels on navigable water are the distinguishing characteristics of a seaman's work . . . The sea is obviously a high risk workplace. So is a vessel in motion on navigable water, even though it may be within sight and hailing distance of land. Vessels in active operation are complex industrial enterprises presenting a range of hazards that differ significantly from those incident to work on land, piers, drydocks, and even vessels that are temporarily out of active marine operation while securely moored or anchored in protected inland water.

David W. Robertson, *A New Approach To Determining Seaman Status*, 64 Tex. L. Rev. 79, 80 (1985) (footnotes omitted).

Unlike Fisher, Papai was not subject to perils of the sea. Papai's status was not doubtful, and his status is not properly a question for a jury.

2. *That A Claimant Is Hired Out Of A Union Hiring Hall Is Irrelevant To His Status.*

Papai argues that employers who use a common union hiring hall should be considered a common employer for purposes of seaman status determinations. No precedent supports this position. In any event, the argument is misplaced. Under the test set forth in *Chandris*, a claimant's status is not determined by his prior jobs with his employer, let alone with a group of other employers, but by whether the claimant's job assignment when he is injured is shore-based or vessel-based.

Papai also argues that simply because he obtained employment through the union hiring hall, that should not be dispositive of his status. HTB agrees. If Papai had a sufficient connection to the Tug, he would be a seaman whether or not he obtained his job out of the union hiring hall.[88] His actual job, not whether he was hired out of a union hiring hall, determines his status.

B. The District Court Correctly Determined That Papai Did Not Have A Sufficiently Substantial Connection To The Tug To Be A Seaman.

Papai was the type of land-based maritime worker that the *Chandris* case (and indeed prior authority) excluded from seaman status. Papai's situation is akin to the hypothetical worker that the Court described in *Chandris* who was a seaman at one time but was transferred to shoreside duty and then injured. The Court stated no doubt that such a person was not a seaman. Similarly, whatever Papai's prior work may have been, the job during which

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[88] Longshoremen, quintessentially LHWCA workers and not seamen, also generally are hired daily out of union hiring halls.

he was injured was a discrete one day shore-based assignment. His prior work—whether for HTB or others—is irrelevant to his status that day.

Papai argues that he should be considered a seaman because his job title was "deckhand" and his union contract described some duties for its members that are operational seaman duties. The Supreme Court has long since decided, however, that a worker's actual job duties, not his job title or possible duties, govern his status. *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 260, 60 S.Ct. 544, 84 L.Ed. 732 (1940) (confirming that claimant was not a seaman though his job title was "deckhand"); *cf. Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 87, 112 S.Ct. 486, 116 L.Ed. 2d 405 (1991) (stating that the claimant's actual work could make him a seaman even though his job title was one enumerated under the LHWCA).[39]

CONCLUSION

No reason exists to torture the meaning of § 905(a), ignore the principles of collateral estoppel, and greatly expand the seaman status test in order to allow a finding that Papai was a seaman. The Court of Appeals decision below should be reversed, and Papai should be precluded from further pursuing seaman remedies.

[39] Papai's brief asserts that the Port Captain (Papai's supervisor on the date of injury) was "not shoreside", but was in charge of the seagoing operation of the Tug. Although the Port Captain was administratively in charge, he worked in an office, not on the tugs. He was higher in authority than the captains of the tugs, but would rarely if ever himself operate a tugboat. (Clinton testimony, RT, Vol. 7, pp. 96-97 and Vol. 9, p. 37.)

Respectfully submitted,

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